SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Supreme Court No. [redacted] 92

Court of Appeals No. 9133

DR. WILLIAM ORLANDO DUGGAR
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WO. 2-8745—WO. 2-8732

INDEX

		Page
1.	Opinions below	1
2.	Jurisdiction	2
3.	Questions Presented	2
4.	Statutes Involved	2
5.	Statement	3
6.	Reasons for Granting the Writ	8
7.	Conclusion	15
8.	Appendix A	17
9.	Appendix B	29

CITATIONS

Cases:

Carnley v. Cochran, 369 U.S. 506 (1962)	9
Davis v. North Carolina, 384 U.S. 737 (1966)	10
Delli Paoli v. United States, 352 U.S. 232 (1957)	2
Escobedo v. Illinois, 378 U.S. 478 (1964)	8
Galarza Cruz v. Delgado, 233 Fed. Supp. 944 (1964)	9
Greenwald v. Wisconsin, 88 S.Ct. 1152 (1968)	11
Inge v. United States, 356 F. 2d 345 (1966)	11
Jackson v. Denno, 378 U.S. 368 (1964)	12
Nash v. United States, (2d Cir.) 54 F. 2d 1006 (1932)	13
People v. Aconda, 47 Cal. Rptr. 353, 359, 360 (1965)	14

	Page
People v. Dorado, 42 Cal. Rptr. 169 (1965)	9
Walder v. United States, 347 U.S. 62 (1964)	2
White v. United States, 349 F.2d 965, 968 (1965)	11

Statutes:

18 U.S.C. §4208(a)(2)	8
18 U.S.C.A. 1952	2
28 U.S.C. §2154(1)	2

Rules:

Rule 14, Federal Rules of Criminal Procedure	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, by his attorneys, Louisell and Barris, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Tenth Circuit.

1. OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, entered March 28, 1968, and judgment in accordance with that opinion (Appendix A, *infra*, pp. 17 *et seq.*) is not officially recorded. Petition for Rehearing

was filed and an order denying said Petition was entered without opinion on April 12, 1968.

2. JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered on March 28, 1968 and an order denying Petition for Rehearing was entered on April 12, 1968. The jurisdiction of the court is invoked under Title 28 U.S.C. §2154(1).

3. QUESTIONS PRESENTED

The questions to be reviewed are:

(A) Did the Court of Appeals err in applying the rationale of *Walder v. United States,* 347 U.S. 62 (1964) to statements taken from the petitioner where those statements were taken in violation of petitioner's constitutional rights and used by the government in rebuttal and no cautionary instruction was given by the Trial Court to the jury to the effect that such statements could only be used in testing petitioner's credibility?

(B) Should this court overrule *Delli Paoli v. United States,* 352 U.S. 232 (1957)?

4. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory provisions are set forth in Appendix B, *infra,* pp. 30-31:

Fifth Amendment to the Federal Constitution;

Sixth Amendment to the Federal Constitution;

Rule 14 of the Federal Rules of Criminal Procedure;

18 U. S. C. §1952.

5. STATEMENT

On July 15, 1965 the petitioner, a Medical Doctor with a specialty in obstetrics and gynecology, was indicted in a six count Indictment, along with Michael B. Bartello, Billy Eugene Dillon, Jack Bernard Harwoods and Kenneth Endicott (R-1).[1] Count I of the Indictment charged that on or about July 5, 1964 the five defendants did unlawfully travel and cause travel in interstate commerce from Detroit, Michigan to Wichita, Kansas with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of unlawful activities—to-wit: bribery in violation of Sections 21-101, 21-105 and 21-824 of the 1949 General Statutes of Kansas, and attempted bribery in violation of Section 21-803 of the 1949 General Statutes of Kansas, and said unlawful activities further consisted of a business enterprise involving gambling in violation of Section 21-915 of the 1949 General Statutes of Kansas, to-wit: a lottery known as "Bingo", and setting up and keeping gambling devices adopted, devised and designed for the purpose of playing games of chance for money and property and keeping a place where persons resort for the purposes of gambling; and that the defendants did do the aforementioned acts and attempted to do so in violation of Section 1952 of Title 18 of the United States Code.[2]

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[1] Unless context indicates to the contrary, figures in parentheses signify as follows: The arabic numeral appearing immediately after "R" refers to the corresponding docket number as appears in the original record; the roman numeral refers to the volume of the transcript and the arabic numeral immediately following the roman numeral refers to the corersponding page of the transcript in said volume designated by the roman numeral.

[2] Counts II, III, IV, and V alleged the same unlawful acts, the only variance being the alleged dates on which the travel occurred. The dates alleged in Counts II, III, IV and V were, respectively, August 2, 1964; August 17, 1964; September 3, 1964; and September 22, 1964.

Count VI alleged a conspiracy in violation of Section 371 of Title 18 of the United States Code, from July 5, 1964 to September 23, 1964, to commit an offense against the United States of America and the laws thereof; the conspiracy being to violate the laws that were alleged to have been violated in Counts I through V (R-1).

Prior to trial, the petitioner moved for a separate trial, alleging that prejudice would result from a joint trial (R-24, 25).

On November 8, 1965 the trial by jury of all defendants (except Harwoods who had died during the pendency of the litigation) commenced before the Honorable Wesley E. Brown, Judge of the United States District Court for the District of Kansas. After the government had rested its case, petitioner took the witness stand in his own behalf. Over Duggar's objection (R-91-V-1485-1486), the Government was permitted to ask him on cross-examination whether certain statements were made to the F.B.I. subsequent to his arrest (R-91-V-1531, 1535, 1536, 1537, 1548, 1549, 1552, 1553, 1558, 1559).

To rebut Duggar's testimony, the Government recalled F.B.I. agent Charles Kellerman (R-92-VI-1755). Kellerman testified as to statements made to him by the defendant Duggar on the evening of September 23rd and the morning and afternoon of September 24, 1964. The agent's testimony as to the alleged statements given to him by the defendant indicated the following: that Duggar knew all along that Harwoods was an abortionist; that he knew all along that Harwoods intended to set up Bingo in Wichita; and that he, Duggar, was to assist in setting up some sort of pledge card gambling in Wichita (R-92-VI-1755-1759).

Originally, the Court ruled that the Government could use these statements on cross-examination of Duggar by asking him if such statemenst were made (R-92-V-1531).

However, as stated, the Government was allowed to call Agent Kellerman to testify to the statements.[3] Further no cautionary instruction was given to the effect that the statements could only be used to test petitioner's credibility.

The facts surrounding the taking of Duggar's statements may be capsulated as follows:

Duggar was arrested as he approached the City of Wichita in a car that Bartello was also riding in, at approximately 5:30 p.m., on September 23, 1964. The charge at the time of arrest was vagrancy (R-89-III-740). Captain Hannon of the Wichita Police who was in charge of the arrest, freely admitted that his immediate purpose after the arrest was to interrogate the defendants. On the witness stand he stated:

> "Quite frankly, I didn't display much intelligence out there to them because we wanted to talk to them later on. This wasn't the place to do it." (R-89-III-897)

Subsequent to his arrest Duggar was taken to the Wichita Police Station where he was "vigorously" interrogated by the Wichita Police. His continued requests for permission to make a phone call were not granted (R-91-V-1456, 1457). During the interrogation by the city police, Duggar also made repeated requests to contact an

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[3] Duggar, in paragraph fourteen (14) of his Motion for a New Trial, alleged error in the admission of these statements arguing that they were taken in violation of his constitutional rights (R-93-VII-2002-2004. The Government opposed the argument, claiming that the statements were admissible in that the defendant had been advised of his rights and had in effect waived his rights (R-93-VII-2039-2041). The Court without formal order, ruled that the Appellants had received a fair trial (R-93-VII-2066).

attorney (R-91-V-1511). These requests seem to have fallen on deaf ears. The fact that he made the requests was not denied by any Government witness. While in custody, the city police accused Duggar of bribing co-defendant Dillon (R-91-V-1511, 1512). During the entire course of the interrogations of September 23, 1964 Duggar had had no sleep or food (R-91-V-1513). At his arraignment, which took place at approximately midnight, petitioner attempted to retain Mr. McRae, co-defendant Dillon's attorney, but Mr. McRae declined to be retained by Duggar (R-91-V-1514).

At approximately 9:25 p.m. on September 23, 1964 the F.B.I. initiated their interrogation of the defendant. The interviewing agent advised Duggar as to his constitutional rights at that time (R-91-V-1496). Duggar was interrogated that night and the following day subsequent to his arraignment (R-91-V-1497, 1498). The interview was terminated on the afternoon of September 24th, when James Foster, a Wichita attorney, arrived at the police station and asked the interviewing agents to cease the interrogation so that he (Foster) might speak with his client. Subsequent to Foster's discussion with Duggar, the attorney offered to continue the interview, but his offer was refused (R-91-V-1437, 1441).

Prior to the interview of September 24, 1964, Duggar informed the agent that an attorney had been retained for him (R-91-V-1501). However, the agent proceeded with the interviews.

The entire investigation and arrests of the defendants was a cooperative effort between the local police and the Federal Government (R-89-III-907).

The Government, during its case in chief, called F.B.I. agent Richard Eckberg, for the purpose of testifying as

to a confession made by petitioner's co-defendant Dillon on the evening of September 23, 1964 (R-90-IV-1076). The Court did instruct the jury that the statement was made after the conspiracy was terminated and was therefore admissible only as to co-defendant Dillon (R-90-IV-1083, 1085).

Dillon's signed confession indicated, among other things, the following: That a meeting had taken place at the Lassen Hotel in Wichita with Dillon, Harwoods, Duggar and Bartello present, at which time gambling, Bingo and abortions were discussed and Dillon was asked whether he could assist in finding a vacant building in which to hold the Bingo games; that Duggar was the medical connection as far as the abortions were concerned; that Duggar, Harwoods and Dillon had gone to El Dorado, Kansas, to meet with a Dr. Darling to persuade him to send his abortion patients to Harwoods.

After the defendant Dillon had rested his case, the Government called F.B.I. agent Eugene W. Ruiz in rebuttal (R-93-VI-1785). The purpose of agent Ruiz's testimony was to relate statements made to him by the defendant Dillon on September 24, 1964. The jury was again made aware of the fact that this testimony was binding only on Dillon. Agent Ruiz testified that at this time Dillon admitted that his signed confession of September 23, 1964 was true in its entirety (R-93-VI-1799).

The Court did not make any attempt to delete the names of the co-defendants from either of Dillon's statements.

On November 23, 1964 the jury, after having been instructed, returned the following verdict after some two and a half days of deliberation:

(a) Defendant Endicott was found guilty as charged;

(b) Defendants Bartello and Dillon were acquitted as to Count I and were found guilty as to the last five Counts;

(c) Defendant Duggar was acquitted as to the first five Counts and found guilty of Count VI only (R-28-35).

A Motion for New Trial was filed on behalf of petitioner (R-36) and was denied without formal order being entered. Thereafter, on January 17, 1966 petitioner was sentenced pursuant to Title 18 United States Code §4208(a(2)) to the custody of the attorney general for a period of three years (R-52). Notice of Appeal was filed on behalf of petitioner on January 26, 1966 (R-58, 59). Petitioner's conviction was affirmed by the United States Court of Appeals, Tenth Circuit, March 28, 1968. Petition for Rehearing was filed and an order denying said petition was entered without opinion on April 12, 1968.

6. REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals, Tenth Circuit herein involved is directly in conflict with this Court's decision in *Escobedo v. Illinois,* 378 U.S. 478 (1964). Petitioner's initial argument in the Court of Appeals was squarely bottomed upon the *Escobedo* decision. The absence of any mention of the *Escobedo* decision in the Court of Appeals' opinion is quite surprising, in that the hoding of that case does have direct applicability to the facts of this case. The two cases bear a close similarity in several important aspects:

(1) The most basic similarity is that the statements of both Duggar and Escobedo were the products of an accusatorial investigation, with the focus on the

accused, and the purpose of which investigation was to elicit incriminating statements. The contention that the post-arrest investigation was predicated upon obtaining evidence from Duggar's own mouth is supported by Captain Hannon's statement that he didn't wish to display too much "intelligence" at the time of arrest because "they wanted to talk to them later on" (R-89-III-897).

(2) Both Escobedo and Duggar had requested and been denied the opportunity to consult with counsel. Duggar's testimony that he had made repeated requests of the Wichita Police to contact counsel was not contradicted at trial. A comparison of the facts of the two cases indicates that Duggar was even more seriously imposed upon than Escobedo. In *Escobedo* there was evidence in the record that Escobedo had previously discussed with his attorney what to do in case of arrest (*Escobedo v. Illinois, supra,* note 5). Duggar did not enjoy this opportunity.

It would seem that appellant Duggar did even more than required for a successful application of the *Escobedo* Doctrine. It cannot be maintained that because he failed to renew his request for counsel to the F.B.I. he may not later claim error. It is clear that when the right to the assistance of counsel is established, neither the prior retention of counsel or the verbalized desire for counsel is necessary to the ripening of the right (*Carnley v. Cochran,* 369 U.S. 506 (1962)); *Galarza Cruz v. Delgado,* 233 Fed. Supp. 944, (1964)). The principle is well stated in *People v. Dorado,* 42 Cal. Rptr. 169 (1965), where it was held that "the failure of the accused to retain or request counsel" does not justify "the application of the rule of law different from that established in *Escobedo.* The basic reasoning of the

Court's opinion in *Escobedo* will not permit such a formalistic distinction." at p. 175.

(3) Both Duggar and Escobedo were faced with false accusations designed to elicit admissions to at least some knowledge of the crime. In *Escobedo* the defendant was told that his accomplice had betrayed him. In the present case Duggar was told that he was being charged with bribing his co-defendant Dillon,[4] obviously for the purpose of implying to Duggar that Dillon had betrayed him (R-91-V-1511, 1512).

(4) In both situations the law enforcement officials were aware that the defendants had retained counsel, and still proceeded to interrogate. In *Escobedo* this fact was obvious since the police actively prevented the defendant's lawyer from seeing him. The agent who interrogated Duggar and testified as to the statements made by him on the evening of the 23rd and on the 24th freely admitted that prior to his interrogation of the 24th the defendant had informed him that he had an attorney retained for him (R-91-V-1501). Still the agent proceeded with the interrogation.

Rather than distinguishing petitioner's case from *Escobedo,* or holding that petitioner's confession was voluntary under the totality of circumstances (see *Davis v. North Carolina,* 384 U.S. 737 (1966)), the Court held that the statements could be used for impeachment purposes under the doctrine of *Walder v. United States, supra.* By applying the doctrine of *Walder,* the Court seems to admit *sub silentio* that the statements were taken in violation of petitioner's constitutional rights under the Fifth and Sixth

[4] Dillon was an employee of the Attorney General of Kansas (R-92-VI-1724-1726).

Amendments to the Federal Constitution. The *Walder* case did hold that in certain circumstances an accused can be impeached by use of otherwise inadmissible evidence. However, the Court was careful to caution the defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief" (*Walder v. United States, supra,* at p. 65). In the present case petitioner made no "sweeping claims" that went far beyond the charges contained in the indictment (see *White v. United States,* 349 F.2d 965, 968 (1965); *Inge v. United States,* 356 F.2d 345 (1966)), and thus *Walder* should not control.

Despite the foregoing, there is a much more obvious and compelling reason why the Court's application of *Walder* has no bearing on the present case. In the *Walder* situation, the Trial Court admitted the illegally obtained evidence only after carefully instructing the jury that it was not to be used to determine whether the defendant had committed the crimes charged, BUT SOLELY FOR THE PURPOSE OF IMPEACHING THE DEFENDANT'S CREDIBILITY (Emphasis supplied). In the present situation no such instruction was given, and the illegally obtained statements went to the jury as substantive evidence of petitioner's guilt. It is petitioner's contention that the procedures used by the law enforcement officials involved[5] clearly violated the standards of *Escobedo v. Illinois, supra;* and, in any event, the statements were involuntary under the rationale of *Davis v. North Carolina, supra* and *Greenwald v. Wisconsin,* 88 S.Ct. 1152 (1968).

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[5] It should be remembered that this was a cooperative effort by the local police and the Federal Government.

B. Petitioner respectfully asks this Court to overrule its decision in *Delli Paoli v. United States, supra,* in light of its holding in *Jackson v. Denno,* 378 U.S. 368 (1964).

Petitioner filed a motion for a separate trial pursuant to Rule 14 of the Federal Rules of Criminal Procedure, which motion was denied.

On February 28, 1968, subsequent to petitioner's trial, Rule 14 was amended by the insertion of the following language: "In ruling on a motion by a defendant for severance, the Court may order the attorney for the Government to deliver to the Court for inspection *in camera* any statements or confessions made by the defendants which the Government intends to introduce in evidence at the trial." This rule, of course, not being in effect at the time of the trial, Trial Court never did have a chance to rule whether petitioner's name should be deleted from co-defendant Dillon's confession. Petitioner does not seek an *ex post facto* application of the amendment. What petitioner does seek is the overruling of *Delli Paoli, supra.*

The Court, in *Delli Paoli,* was asked to determine whether the admission of a co-defendant's confession made after the termination of the alleged conspiracy was reversible error as to the co-defendants. The Trial Court, in *Delli Paoli,* as in the instant case had given a clear instruction that the statement could only be considered in determining the guilt of the confessor. In a brief opinion, a five-to-four majority, speaking through Mr. Justice Burton, held that: "... under the circumstances of this case, such a restricted admission of the confession did not constitute reversible error," (at page 233).

The four-man dissent adopted by reference Judge Frank's dissent in the Court of Appeals, 229 F.2d at 322. The thrust

of Judge Frank's dissenting Opinion was that the Government may not have its evidential cake and eat it too:

> "I think something like the following is the correct rule: When several defendants are on trial for criminal conspiracy, if the Government seeks to put in evidence of an out-of-court statement by one defendant which is hearsay as to the others (i.e., an out-of-court statement made atfer the conspiracy has terminated), then
>
> (a) Unless all references to the other defendants can be effectively deleted (so that the statement will contain no hint of the other's guilt) and unless those references are deleted,
>
> (b) The trial judge must (1) refuse to admit the statement or (2) sever the trial of those other defendants." (at 324)

The rationale of this argument is that the jury, even with a cautionary instruction will not be able to perform "a mental gymnastic which is beyond not only their powers, but anybody else's." (*Nash v. United States* (2d Cir), 54 F.2d 1006 (1932)). This rationale was rejected by the majority in *Delli Paoli*. However, a subsequent Supreme Court decision gives a strong indication that the dissenters' reasoning might well be accepted by this Court as now constituted.

In *Jackson v. Denno, supra,* the Supreme Court held that where the state seeks to use a confession of a defendant at trial, and the issue of voluntariness is raised, the defendant is entitled to a separate hearing, outside of the presence of the jury, on the issue of voluntariness. If the confession is deemed involuntary, the jury may not be made aware of its existence. If it is held to be voluntary, it may then be submitted to the jury who will evaluate its credibility. The logic behind the holding is that where the entire matter is

submitted to the jury, and they find the confession was involntary, they will, nevertheless, be unable to ignore it, even though instructed to do so. In such a situation, inadmissible evidence may play an important part in the jury's deliberations, thus seriously infringing upon the defendant's right to have a fair trial.

Petitioner contends that principles of *Jackson v. Denno, supra,* are directly applicable to the present situation. Even though Dillon's statement was admitted, accompanied by a cautionary instruction that it was not admissible as to the petitioner, it is impossible to know whether and to what degree the confession played a part in the conviction of petitioner. The Supreme Court of California agreed with this application of *Jackson v. Denno, supra,* in *People v. Aconda,* 47 Cal. Rptr. 353, 359, 360 (1965). However, rather than decide the constitutional issue raised in *Jackson,* the California Court promulgated "judicially declared rules of practice" applicable to the trial courts of that state. These rules of practice conformed to those suggested by Judge Frank in *Delli Paoli, supra.*

Petitioner does urge that both questions presented for review are of significant importance to the jurisprudence of this country. Petitioner does also urge that he is a medical doctor with no history of criminal involvement, and and that he in obtaining his position in life has overcome abject poverty and other obstacles which need not be enumerated; that if this conviction stands, he will lose not only his liberty for as much as three years, but there also is a great possibility that he will lose his medical license, a forfeiture so severe that we cannot find words to describe it.

7. CONCLUSION.

For the reasons aforementioned, petitioner does pray that a Petition for Writ of Certiorari to the Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

JOSEPH W. LOUISELL,
IVAN E. BARRIS.

Of Counsel:
NEIL HOWARD FINK.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term—1967

BILLY EUGENE DILLON,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.
No. 9131

MICHAEL BRUCE BARTELLO,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.
No. 9132

WILLIAM O. DUGGAR,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.
No. 9133

KENNETH ENDICOTT,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.
No. 9134

OPINION

Appeal from the United States District Court
For the District of Kansas

Neil Howard Fink (Joseph W. Louisell and Ivan E. Barris, Detroit, Michigan, with him on brief) for appellants Dillon, Duggar and Bartello.

Fred E. Bruner, Dallas, Texas (Jerry Lasterlick, Dallas, Texas, with him on brief) for appellant Endicott.

Guy L. Goodwin, Assistant United States Attorney, Wichita, Kansas (Newell A. George, United States Attorney, Wichita, Kansas with him on brief) for appellee.

Before Pickett, Hill and Hickey, Circuit Judges.

Hickey, Circuit Judge.

The appellants were charged in five counts with violation of 18 U.S.C. §1952, commonly called anti-racketeering legislation which was enacted by Congress in 1961. In count VI each appellant was charged also with conspiracy, in violation of 18 U.S.C. §371.

Endicott was found guilty on all counts: Bartello and Dillon were found guilty on counts II through VI; Duggar was found guilty on count VI, conspiracy. Motions for a new trial were filed and denied. Sentences were pronounced and this appeal followed.

Endicott charges error in the admission of evidence of the crime of abortion. It is alleged the crime of abortion is not within the unlawful activities proscribed in 18 U.S.C. §1952. Dillon charges he was not arraigned without unnecessary delay as required by Fed. R. Crim. P. 5(a), and his confession was not admissible because his constitutional rights were violated. The error assigned by Duggar is the admission of testimony relating to statements made by

him after his arrest which were allegedly fruits of interrogations made in violation of the Fourth and Fifth Amendments. Bartello charges error in admitting testimony from a deposition of a co-conspirator, who died before the trial, which deposition by innuendo exposed Bartello's prior convictions. Endicott, Bartello and Duggar also allege error in the denial of their motions for separate trials.

The scheme charged was an attempt on the part of the accused to establish and carry on gambling and bribery in the State of Kansas. Also a part of appellants' scheme but not charged in the indictment, was the establishment of an abortion ring.

The mode of gambling to be established by appellants was bingo. Bingo is illegal in Kansas; therefore, in order to set up and operate the scheme it was necessary to have police protection. Several police officers identified appellants as persons who offered bribes, identified their associates and described the scheme to them. Dillon who was an investigator on the payroll of the Attorney General of Kansas, was used to assure the persons contacted that the scheme had been cleared with the Attorney General's office. The testimony of local realty managers related efforts made by appellants to rent locations for bingo games to be operated for charitable purposes.

The testimony of a locally known convicted abortionist disclosed a plan to set up a referral operation under which the witness and other physicians would direct abortion referrals to appellants' abortion clinic in Wichita, Kansas. Bartello was to be the "contact man" who would take the women to be aborted. Duggar, a medical doctor from Detroit, Michigan, was to provide medical attention in the event serious health problems arose or hospitalization was required.

We consider appellant Endicott's objection to the evidence of abortion offered and received during the trial because it relates to the scope of the statute under which the appellants were indicted.

The statute is a trifid declaration of offenses with a bifarious definition of "unlawful activity". The indictment and prosecution in this case directs itself to 18 U.S.C. §1952 which provides in part:

> "(a) Whoever travels in interstate . . . commerce . . . with intent to—
>
> (3) . . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of an unlawful activity, and thereafter performs or attempts to perform any of the acts specified in [sub-paragraph] . . . (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling . . . or (2) . . . bribery . . . in violation of the laws of the State in which committed or of the United States."

Endicott contends it was error to admit evidence of the crime of abortion because the crime is not within the purview of 18 U.S.C. §1952. It is also contended evidence of abortion "did not prove intent, did not show a course of conduct or did not tend to prove the crimes charged in the indictment." We cannot agree with these contentions. The reason or motive for the bribery was immunity from prosecution for gambling by lottery (bingo) and abortion, both violations of the laws of Kansas. The intent to condemn the violation of state law as contained in 18 U.S.C.

§1952 is discussed in United States v. Miller, 379 F.2d 483, 488 (7th Cir. 1967). The statute has been discussed and interpreted by several of the circuits. United States v. Ross, 374 F.2d 227 (6th Cir. 1967); United States v. Hawthorne, 356 F.2d 740 (4th Cir. 1966); Marshall v. United States, 355 F.2d 999 (9th Cir. 1966); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964). In our circuit the District Court of Colorado discussed the statute in United States v. Ryan, 213 F. Supp. 763 (D. Colo. 1963). All of the courts have identified the purpose of Congress to stamp out racketeering which flourished because of gambling (lotteries) and bribery, together with other evils identified in the section.

Although the crime of abortion is not specifically mentioned in 18 U.S.C. §1952, the crime of bribery is, and in order to prove the violation of the Kansas bribery statute it was necessary to show what the bribes sought to protect. "It is elementary that the evidence of other offenses is not admissible in the trial of a criminal offense. This rule is not applicable if the evidence is introduced to prove intent or to show a course of conduct, or tends to prove the crime charged. [Citations omitted]." Jones v. United States, 251 F.2d 288, 294 (10th Cir. 1958). Evidence of abortion was material to the issues being tried. Woodland v. United States, 347 F.2d 956, 958 (10th Cir. 1965).

Dillon urges that the admission of his statement was error because he was not "taken without unnecessary delay before the nearest available commissioner."[1] This is the only ground urged; therefore, our question is narrowed to whether or not the delay was unnecessary. The governing principles of law with a full discussion of the controlling precedents setting forth fully and adequately

[1] Fed. R. Crim. P. 5(a).

the rules which control this point on appeal are contained in Walton v. United States, 334 F.2d 343 (10th Cir. 1964), cert. denied 379 U.S. 991, 85 S.Ct. 706, 707, 13 L.Ed. 2d 612; Zamora v. United States, 369 F.2d 855 (10th Cir. 1966).

Dillon, on the request of city police, went to the police station at 5:25 P.M. and was placed in an interview room. At 6:17 P.M. agents of the Federal Bureau of Investigation went into the room and advised Dillon of the charges pending against him and of his constitutional rights. He voluntarily gave them a statement. The record reveals the officers were diligently searching for a commissioner during this period and located one at 10:00 P.M. who immediately came to the police station and arraigned Dillon at 10:30 P.M. This court has recognized that it is now settled that if an arrested person makes an incriminating statement after an arresting officer has failed to comply with Rule 5(a) the statements are not admissible even though voluntarily made. Walton v. United States, supra at 346. While the officers were attempting to locate the commissioner, Dillon learned that a search warrant for his home had been obtained and he voluntarily consented to the search and told the officers of his assocation with the other defendants. The record reflects that the objections to the introduction of the statements were not based upon a violation of Fed. R. Crim. P. 5(a) but were based on its effect upon the other defendants and a contention that it was not voluntarily made.

We conclude the delay was not unnecessary because the government has met the burden of proving they diligently sought a commissioner and as soon as one was available the agents took the accused before him for arraignment. Although the trial court did not have the specific question of unnecessary delay before it, because the issue was not

raised,[2] it did hear testimony regarding the diligent search for a commissioner and under all the circumstances admitted the statements into evidence. The specific facts of this case, together with the rules heretofore adopted by this court in Walton v. United States, supra, direct us to the conclusion there was no unnecessary delay and, therefore, the statement was admissible. Butterwood v. United States, 365 F.2d 380, 384-385 (10th Cir. 1966); Stille v. United States, 354 F.2d 233 (10th Cir. 1965).

It is further contended by Dillon that after counsel had been retained for him the F.B.I. agent interviewed him without his counsel being present and this procedure tainted the admissions. We do not agree. The fact that Dillon's counsel was not present at the time the admissions were confirmed does not ipso facto render them inadmissible. Butterwood v. United States, supra at 383. The presence of counsel can be waived as well as demanded. Certainly, if an accused can waive the right to counsel when that right first attaches, Adams v. United States ex rel, McCann, 317 U.S. 269, 279 (1942); Leighton v. Cox, 365 F.2d 122 (10th Cir. 1966), he can waive the right to have counsel present subsequent to counsel's appointment or retainment. The concern in each instance is that the waiver be intelligently made. Id. The record here indicates the F.B.I. agent again advised Dillon of all his constitutional rights before he proceeded with the re-interview. It is clear the re-interview was to give the accused an opportunity to confirm or change his voluntary statement of the day before and was not a sustained question-and-answer interrogation. The situation is similar to that in Otney v. United States, 340 F.2d 696 (10th Cir. 1965) (concurring opinion), because Dillon had been advised of his right to counsel when

[2] Wheeler v. United States, 382 F.2d 998, 1001 (10th Cir. 1967).

previously interviewed by the F.B.I. agent, when arraigned, before the United States Commissioner, and again by the F.B.I. agent before the re-interview. In view of Dillon's official position, his intelligence, and experience in the law enforcement field and apparent good mental condition, we cannot say his ability to determine whether he should confirm the statements already made was unfairly undermined or the confirmation was unfairly adduced.

Appellant Dr. Duggar, a medical doctor with a specialty in obstetrics and gynecology, contends his constitutional rights were violated because the Wichita Police denied his requests to make phone calls and to contact an attorney, vigorously interrogated him and denied him food and rest. Such conduct allegedly took place between the time Duggar was arrested at 5:30 P.M. on September 23, 1964, and 9:25 P.M. of the same day, at which time an F.B.I. agent read the federal complaint to Duggar and advised him of his constitutional rights. The only evidence of the alleged misconduct on the part of the Wichita Police is the testimony of Duggar himself. It is undisputed that the Wichita Police advised Duggar at the time of his arrest that there was a federal process outstanding for his arrest. It is also undisputed the F.B.I. agent advised Duggar of his rights. No statements of any kind were taken by the Wichita Police. The only statements made by Duggar were those made to the F.B.I. agent. Duggar contends that it was error to permit the government to impeach his testimony by using the statements.

Duggar took the stand in his own behalf; on cross-examination Duggar was asked if he had made certain statements to the F.B.I. subsequent to his arrest. Upon objection by Duggar's counsel, the court held a hearing outside the presence of the jury and on the basis of the evidence

introduced found that Duggar's rights had not been violated and that the government could inquire as to whether or not statements were made to the F.B.I. agent. The court subsequently permitted the agent to testify in rebuttal regarding the statements made.

Miranda v. Arizona, 384 U.S. 436 (1966) had not been decided when this trial occurred. Walder v. United States, 347 U.S. 62 (1954) contained the standards for impeachment by prior statements illegally obtained.

The record reflects the impeachment was directed to a collateral issue and not to the controlling admission of guilt. The statement did not contain an admission of guilt, but was in nature exculpatory. Only collateral matters may be impeached and not those that pertain to the crux of the indictment. United States v. Curry, 358 F.2d 904 (2nd Cir. 1965); Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966). Therefore, we find that it was not error for the court to allow government counsel to ask the defendant on cross-examination whether or not he had made certain statements to the F.B.I. agent. The statements did not contain an admission of guilt to any of the charges on which Duggar was being tried, 3 Wigmore, Evidence §821(3)(3rd ed. 1940); therefore, it was proper to permit the use of the statements in rebuttal to test the credibility of the defendant on collateral matters. United States v. Curry, supra; Inge v. United States, supra.

On September 14 and 15, 1965, Endicott, Bartello and Duggar moved for separate trials pursuant to Fed. R. Crim. P.8(b) and 14. The briefs argue the point under Rule 14; therefore, we address ourselves to the contentions contained therein. The motion and its denial predate the 1966 amendment to Rule 14.

It is contended prejudice resulted from the combined trial because the names of Endicott, Bartello and Duggar

were not deleted from statements made by Dillon which were admitted into evidence. Although the court instructed the jury that the statements could only be considered in determining the guilt of Dillon, it is contended the cautionary instruction did not cure the prejudice.

It is interesting to note that each judge except two in this circuit has written on the rule announced in Opper v. United States, 348 U.S. 84, 95 (1954).[3] Each case holds that the trial court's discretion is broad and its action will be upheld in the absence of a clear abuse of discretion. We find no clear abuse of discretion here. The cautionary instruction cured what might otherwise have been resulting prejudice. We may . . . fairly proceed on the basis that the jury followed these instructions." Delli Paoli v. United States, 352 U.S. 232, 241 (1957).

We find merit in the claim of Bartello relating to the admission of questions propounded by the prosecutor to a dying co-conspirator whose testimony was perpetuated pursuant to Fed. R. Crim. P. 15. The portion of the deposition offered after Bartello had rested his defense without taking the stand was :

"Q. Did you know that he [referring to Bartello] had been previously convicted of violation of the gambling laws of the State of Michigan?

A. I knew nothing of his previous life.

Q. And in 1947 he received a sentence of three years for conspiring to violate the gambling laws of Michigan?

A. I repeat. I knew nothing of his previous life."

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[3] Kolod v. United States, 371 F. 2d 983, 990 (10th Cir. 1967); Glass v. United States, 351 F.2d 678, 680 (10th Cir. 1965); Roth v. United States, 339 F.2d 863, 865 (10th Cir. 1964); Baker v. United States, 329 F.2d 786, 787 (10th Cir. 1964); Dennis v. United States, 302 F.2d 5, 7 (10th Cir. 1962).

Government counsel argues the questions were admissible to show the intent of Bartello. On direct examination the deponent had been asked if he knew what Bartello's motivation was in going to Wichita. The reply was that Bartello was a bartender whose bar had to close and he went to Wichita to look for a night club.

It is true that intent is an element of the crime with which Bartello was charged. However, it is difficult, under the circumstances of this case, to see the probative value of the testimony for proving the guilt or innocence of Bartello. At least one of the previous crimes had been committed seventeen years prior to the charges in this case. Bartello had rested his defense without having put his character in issue. The deponent Harwoods, had testified that he met Bartello on a certain date which post-dated the time of the alleged convictions. Harwoods further testified that he knew nothing of Bartello's past life. In addition, the evidence of the prior convictions came not from Bartello or from Harwoods, but entered the case through the words of the government counsel. The mere asking of the questions here involved, however answered, "may well suggest to the jury that the imputation is true." McCormick, Evidence §158, at 336 (1954). The only purpose of the questions which appears to us was to show Bartello had prior convictions. Whatever the relevancy of the evidence, it does not outweigh the right of Bartello to be protected against unfair prejudice.

The record is not clear as to whether or not the specific questions were objected to when offered in the presence of the jury; nevertheless, we conclude it was plain error to have admitted the evidence. The effect of the questions was to acquaint the jury with Bartello's past record. This was prejudicial to him.

"We are, of course, loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridiculous to the man on the street. But, 'All law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished.' [Citation omitted]. In circumstances like these the question is not whether the appellants have been proven guilty but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury. It is not enough to be able to say that the evidence is entirely sufficient to convict without reference to prior records of appellants and that the jury would have in all probability returned a verdict of guilty without such knowledge. The question we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge. In other words, can we say with reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury'? We cannot so say, and the cases must, therefore, be reversed." Sumrall v. United States, 360 F.2d 311, 314 (10th Cir. 1966).

We cannot say with certainty that the reference to the prior convictions had but slight effect on the jury. Therefore, we reverse the conviction of Bartello.

AFFIRMED as to Dillon, Endicott and Duggar.

REVERSED and REMANDED for a new trial as to Bartello.

APPENDIX B

Constitution of the United States

Amendment V:

No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Rule 14 of Federal Rules of Criminal Procedure.

Relief from Prejudicial Joinder—

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial. As amended Feb. 28, 1966, eff. July 1, 1966.

U.S.C.A. 18—Crimes and Criminal Procedure—

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, §1(a), Sept. 13, 1961, 75 Stat. 498, amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212.